SUBJECT INDEX

Page

I.

Introduction 1

II.

Counterstatement of Questions Presented 2

III.

Reasons for Denying the Writ 3

A. Petitioner Has Incorrectly Characterized the Holding of the Court of Appeals 3

B. The Decision of the Court of Appeals Is Not in Conflict With the Decision in Puritan Sportswear 4

C. The Decision of the Court of Appeals Was Consistent With Decision of This Court in Metropolitan Life 5

D. The Board's Decision Was Wholly Inconsistent With Its Prior Decisions in the Instant Case and in Other Cases 7

E. The Board Failed to Give Adequate Reasons for the Inconsistency 10

F. The Court of Appeals Decision Did Not Restrict the Board's Freedom to Choose an Appropriate Unit 12

Conclusion 13

TABLE OF AUTHORITIES CITED

Cases	Page
NLRB v. Metropolitan Life Insurance Company, 380 U.S. 438 (1965)	2, 5, 6, 7
National Labor Relations Board v. Puritan Sportswear Corp., 385 F.2d 142 (3rd Cir. 1967)	4, 5
R. H. Macy Co., Inc., 180 NLRB No. 59 (1969)	8, 9, 11
The May Department Stores Company d.b.a. Famous Barr Company, 176 NLRB No. 14 (1969)	8, 9, 11
H. P. Wasson & Co., 153 NLRB No. 1499 (1965)	7, 9, 11
Rules	
Rules of Court, Rule 19	2
Statutes	
National Labor Relations Act, Sec. 8(a)(5)	1
National Labor Relations Act, Sec. 9(c)(5)	3, 4

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-1646

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

THE MAY DEPARTMENT STORES COMPANY,

Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

I.

Introduction.

Petitioner seeks review of the judgment below which set aside an order of the National Labor Relations Board (sometimes referred to herein as the "Board") which held that Respondent herein, The May Department Stores Company (sometimes referred to herein as "May"), violated Section 8(a)(5) of the National Labor Relations Act by refusing to bargain with Teamsters Local 196 after the Union received a majority of votes cast in a representation election held at May's service facility in downtown Los Angeles.

Under the heading "Reasons For Granting The Writ", Petitioner has grossly mischaracterized the holding of the court below and using this mischaracterization as a point of departure have drafted their state-

ment of Questions Presented so as to include issues which were not raised or decided by the court below.

Even accepting Petitioner's characterization of the holding below and the Questions Presented Petitioner has failed to show that the Questions Presented meet the standards for this Court's exercise of its certiorari jurisdiction as stated in Rule 19.

II.

Counterstatement of Questions Presented.

Should this court review the decision of the Court of Appeals which set aside an order of the National Labor Relations Board requiring Respondent to bargain with a labor organization in a bargaining unit where the decision of Petitioner establishing the bargaining unit was:

1. Contrary to and inconsistent with two prior decisions of Petitioner holding a much larger bargaining unit appropriate;

2. Contrary to and inconsistent with other prior decisions of Petitioner holding much larger bargaining units appropriate under the same facts and circumstances as were present in the instant case;

and where the Petitioner failed to articulate reasons for its inconsistent decision contrary to the mandate of this court to give such reasons set forth in *NLRB V. Metropolitan Life Insurance Company*, 380 U.S. 438 (1965).

III.

Reasons for Denying the Writ.

A. Petitioner Has Incorrectly Characterized the Holding of the Court of Appeals.

Petitioner states:

> "The court of appeals held that Section 9(c)(5) of the National Labor Relations Act prohibits the Board, in choosing between two units for collective bargaining purposes, each of which would be appropriate without regard to the extent of union organization, from selecting the unit requested by the union." (Petition, p. 7)

The Court of Appeals, however, expressly stated both the substance of and reasons for its holding as follows:

> "Because the board gave controlling weight in determining the bargaining unit to the extent of unionization, in violation of Section 9(c)(5) of the Act; and because the board failed to distinguish its decision in this case from its many inconsistent decisions in cases involving substantially identical fact situations, we grant the petition to set aside the order and deny the cross-application for enforcement." (Petitioner's Appendix A, p. 2a)

Thus, contrary to Petitioner's position, the Court of Appeals did *not* determine that Section 9(c)(5) of the Act prohibits the Board from selecting one of two appropriate units when that unit is requested by the Union. The Court of Appeals held only that in this particular case the decision of the Regional Director is conclusive of the proposition that he and hence the Board gave controlling weight to the degree of unionization in determining the appropriate unit in express

violation of the terms of 9(c)(5) of the Act; and that when the Board decides a case in a manner inconsistent with its prior holdings it must set forth the reasons for its decision.

B. The Decision of the Court of Appeals Is Not in Conflict With the Decision in Puritan Sportswear.

Petitioner asserts that the Court of Appeals decision conflicts with that in *National Labor Relations Board v. Puritan Sportswear Corp.*, 385 F.2d 142 (3rd Cir. 1967). In that case the Court of Appeals upheld the Board's determination that a smaller unit was appropriate where three years earlier the Board had certified a larger unit and the employees had rejected the union. The court held that both units were appropriate and that the Board had not violated Section 9 (c)(5) of the Act because "relevant and significant factors in addition to 'the extent to which the employees have organized' underlay and supported the Board's decision." *Id.* at 143.

The Court of Appeals' decision in the instant case is distinguishable from the decision in *Puritan Sportswear* in several respects. (1) In the instant case the Court of Appeals held that the decision of the Board did contravene Section 9(c)(5) of the Act, while in *Puritan Sportswear* the Court of Appeals held the decision of the Board did not contravene Section 9(c)(5) of the Act. (2) In the instant case the Court of Appeals found that the Board had given *no reason* for the change in the designation in the bargaining unit, while in *Puritan Sportswear* the Court of Appeals found there were "relevant and significant factors" which supported the Board's decision. (3) The Court of Appeals in the instant case found the Board's decision to

be in direct conflict with *other decisions* of the Board involving other employers on identical fact situations without any explanation, while the Court of Appeals in *Puritan Sportswear* made no such finding. (4) The Court of Appeals in the instant case did not hold that both units selected by the Board were appropriate units, while the Court of Appeals in *Puritan Sportswear* did so hold.

C. The Decision of the Court of Appeals Was Consistent With Decision of This Court in Metropolitan Life.

The decision of the Court of Appeals is consistent with this court's opinion in *NLRB v. Metropolitan Life Insurance Company,* 380 U.S. 438 (1965). In that case, Justice Goldberg speaking for eight members of the Court held that the Board must articulate its reasons for inconsistent decisions in order to facilitate judicial review.

The *Metropolitan Life* case involved a Court of Appeals decision which refused to enforce a Board order requiring the employer to bargain with a Union after the employer's objection to the appropriateness of the unit, by means of a refusal to bargain with the Union after certification by the Board was disallowed by the Board and the employer was found guilty of an unfair labor practice.

The United States Supreme Court remanded the case to the Board for further proceedings because of the Board's failure to set forth the basis for its decision. The Court held:

> "On the other hand, due to the Board's lack of articulated reasons for the decisions in and distinctions among these cases [footnote omitted], the Board's action here cannot be properly re-

viewed. When the Board so exercises the discretion given to it by Congress, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' [Footnote omitted.] Phelps Dodge Corp. v. Labor Board, 313 US 177, 197, 85 L ed 1271, 1284, 61 S Ct 845, 133 ALR 1217. See Burlington Truck Lines v. United States, 371 US 156, 167-169, 9 L ed 2d 207, 215, 216, 83 S Ct 239; Interstate Commerce Comm'n v. J-T Transport Co., 368 US 81, 93, 7 L ed 2d 147, 156, 82 S Ct 204. Although Board counsel in his brief and argument before this Court has rationalized the different unit determinations in the variant factual situations of these cases on criteria other than a controlling effect being given to the extent of organization, the integrity of the administrative process requires that 'courts may not accept appellate counsel's post hoc rationalizations for agency actions. . . .' Burlington Truck Lines v. United States, supra, 371 US at 168, 9 L ed 2d at 216; see Securities & Exchange Comm'n v. Chenery Corp., 332 US 194, 196, 91 L ed 1995, 1999, 67 S Ct 1575. For reviewing courts to substitute counsel's rationale of their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process for it would 'propel the court into the domain which Congress has set aside exclusively for the administrative agency.' Securities & Exchange Comm'n v. Chenery Corp., supra, 332 US at 196, 91 L ed at 1999." *NLRB v. Metropolitan Life Insurance Company*, 380 U.S. 438, 442-444.

Thus, in refusing to enforce the Board's order because the Board failed to set forth the *reasons* for its inconsistent holding, the Court of Appeals in the case at bar followed the mandate of the United States Supreme Court in *Metropolitan Life*.

The Supreme Court in *Metropolitan Life* recognized that "courts may not accept appellate counsel's post hoc rationalizations for agency actions." *Id.* at 444.

The Court of Appeals in the instant case also recognized this rule when it stated, "Counsel's after-the-fact attempts to explain the record are inadequate." (Petitioner's Appendix A, page 5a). Thus, the attempts of Petitioner's counsel to rationalize the Board's decision in his brief to the Court of Appeals and to this Court come too late to be considered as grounds for upholding the Board's action. The Board's decision must stand or fall on the basis of its own contents.

D. The Board's Decision Was Wholly Inconsistent With Its Prior Decisions in the Instant Case and in Other Cases.

The basic questions decided by the Regional Director of Region 21 of the Board and affirmed by the order of the Board was whether or not certain workroom employees employed in Petitioner's service building should be included in a bargaining unit of other employees working on the same floors in the same building.

This basic question was well settled by the Board in three decisions involving retail department store service buildings under facts and circumstances nearly identical to those of the instant case. In *H. P. Wasson & Co.*, 153 NLRB No. 1499 (1965), Respondent Board

included a rug cutter in a unit of employees performing traditional warehouse functions.

In *The May Department Stores Company d.b.a. Famous Barr Company,* 176 NLRB No. 14 (1969) the Board held appropriate a bargaining unit which included all employees employed at the Petitioner's Spring Avenue facility in St. Louis, including approximately 225 employees who performed traditional warehouse functions and approximately 90 employees employed in the furniture, carpet, appliance, and radio and television workrooms and in the fur storage vault.

Finally in *R. H. Macy Co., Inc.*, 180 NLRB No. 59 (1969), the Board included employees employed in the employer's furniture, television, and lawnmower repair workrooms in a unit of warehouse employees at the employer's Atlanta Service Building. In so holding, the Board said:

> "It is clear that the service building is essentially a place where goods are received, stored, processed, and then shipped to the retail stores or directly to customers, and that the employees located there are engaged in such activities or closely related work. Though some of the work of the workshop employees is concerned with repairing goods after they have reached the customer, others of the workshop employees, like the warehouse employees, process goods before they are delivered. For example, employees in the furniture shop may repair damaged furniture before sale or shipment, and the rug workshop performs cutting and installation. Also, as indicated, the Service Building Manager is the top supervisor for all service building workers, including those whom the Employer would exclude from

> the unit. In these circumstances, the fact that workshop employees are more skilled than warehousing employees no more suggests the inappropriateness of the building-wide unit than does the fact that a plant may have employees of varying skills suggest the inappropriateness of a plant-wide unit."

A comparison of the facts present in the *Famous Barr, Macy* and *Wasson* decisions with those present in the instant case reveal that there is an even closer community of interest between the employees included and those excluded in the instant case than was true in the cited cases. Yet the decision of the Board in the instant case is contrary to and totally inconsistent with the decisions in *Famous Barr, Macy* and *Wasson.*

In addition, the Petitioner's decision was a complete departure from its prior decision involving the same facility. In this connection upon a petition filed by Miscellaneous Warehousemen, Drivers & Helpers Local 986, William G. Wilkerson, Acting Regional Director, issued his Decision and Direction of Election on August 10, 1967, in Case No. 21-RC-10457 in which he held the following employees of Respondent herein constituted a unit appropriate for purposes of collective bargaining:

> "All employees employed at the employer's Service Building located in Los Angeles, California; excluding all office clerical employees, guards and supervisors as defined in the act."

Implicit in this decision was the inclusion of all workroom employees in the bargaining unit. In addition, the acting Regional Director (at page 46 of his decision)

expressly included the timekeeper, cashier and mail distribution girl.

By a Decision and Direction of Election issued January 30, 1970, Ralph E. Kennedy, the Regional Director of Region 21 of Petitioner, held that the following employees of Respondent herein constituted a unit appropriate for purposes of collective bargaining:

> "All warehouse employees, including heads of stock and assistants to the furniture buyers, employed at the Employer's service building located at Jefferson Boulevard and Grand Avenue in Los Angeles, California; excluding all other employees, including workroom employees, office clerical employees, timekeeper, cashier, receptionist, assistant timekeeper and cashier or mail distribution girl, guards and supervisor as defined in the act."

It could not be plainer that the two decisions involving Respondent's Los Angeles, California, Service Building are completely inconsistent in that the prior decisions *included* the workroom employees, timekeeper, cashier and mail distribution girl, while the later decision *excluded* them.

E. The Board Failed to Give Adequate Reasons for the Inconsistency.

The Court of Appeals held that the Board failed to give an adequate explanation for its inconsistent opinion. In this connection the Court stated:

> "A careful reading of the 'Decision and Direction of Election' of the regional director, affirmed by the board, is conclusive of the proposition that the only attempted explanation of the departure

from the holdings in the *Wasson, Famous Barr* and *Macy* decisions is contained in one sentence:

> 'Thus, in each of these cases, the petitioner [Union] sought a unit which included the workroom employees.'
>
> * * *
>
> "Hence the one sentence statement of reasons by the board fails utterly to distinguish its other inconsistent decisions." (Petitioner's Appendix A, pp. 7a, 8a).

Furthermore the Court of Appeals soundly based its decision upon the failure of the Petitioner to adequately explain its two inconsistent decisions involving Respondent's service building. In this connection, the Court stated:

> "Although we do not contest the board's counsel's general proposition that more than one unit may be appropriate at any facility [*See State Farm Mutual Automobile Insurance Co. v. N.L.R.B.*, 411 F.2d 356 (7th Cir. 1969), cert. denied 396 U.S. 832 (1969)], we are not convinced that merely because the board, at the urging of the union, has made two conflicting determinations this shows conclusively that there are two appropriate units in one facility.
>
> There was no significant change between 1967 and 1970 at the May service facility. In view of the fact that the union sought a facility-wide uni', lost the election, and then sought a fragmented unit, we feel that it is incumbent upon the board at the very least to confront the inconsistency between its two rulings and give adequate reasons why it finds two different appropriate units within

the same facility. Counsel's after-the-fact attempts to explain the record are inadequate." (Petitioner's Appendix A, p. 5a).

F. The Court of Appeals Decision Did Not Restrict the Board's Freedom to Choose an Appropriate Unit.

Petitioner asserts that:

> "The question whether Section 9(c)(5) prohibits the Board, in choosing between units, each of which would be appropriate without regard to the extent of union organization, from selecting the unit requested by the union is an important one in the administration of the Act." (Petition, p. 12).

While this may well be true, it was neither an issue nor a holding in the instant case.

The Court of Appeals clearly stated that its refusal to enforce the Board's order was based on inconsistencies of the Board's order with prior Board determinations on substantially identical fact situations, and a failure by the Board to explain the reasons for that inconsistency.

As has been demonstrated above, prior decisions of this Court require denial of enforcement of Board orders when those two circumstances are present in a given case. The decision of the Court below in no way restricts or limits the ability of the Petitioner to find more than one unit appropriate for purposes of collective bargaining when the petitioner properly explains the reasons for its decision.

Conclusion.

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated: July 20, 1972.

Respectfully submitted,

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Attorney for Respondent.